OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 05-03 July 8, 2005

TO: All Division Heads, Regional Directors,
Officers-in-Charge, and Resident Officers

FROM: Arthur F. Rosenfeld, Acting General Counsel

SUBJECT: Report on Case Developments
November 2004 through January 2005

Attached is a report on case developments in the Office of the General Counsel during the period November 2004 through January 2005.

/s/
A.F.R.

cc: NLRBU
Released to the Public

REPORT OF THE GENERAL COUNSEL

This report covers selected cases of interest that were decided during the period from November 2004 through January 2005. It discusses cases decided upon a request for advice from a Regional Director or on appeal from a Regional Director's dismissal of unfair labor practice charges. In addition, it summarizes cases in which the General Counsel sought and obtained Board authorization to institute injunction proceedings under Section 10(j) of the Act. This Report also discusses cases involving some of the ethical issues that confront us in the administration of the Act.

EMPLOYER INTERFERENCE WITH PROTECTED ACTIVITIES

UNION'S RIGHT OF ACCESS TO AN EMPLOYER'S EXTERIOR PREMISES IN CALIFORNIA

This case presented questions regarding the effect of the D.C. Circuit's decision in Waremart Foods d/b/a WinCo Foods, Inc. v. NLRB, 354 F.3d 870 (2004), on a union's right of access to an employer's exterior premises in California. We concluded that complaint should issue, absent settlement, alleging that the Employer violated § 8(a) (1) by threatening Union handbillers outside the Employer's premises because, under current Board law applying California's Moscone Act (Cal.Civ.Proc.Code §527.3), the Employer's property interests were insufficient to exclude the Union's peaceful activity. We authorized this complaint because it is the only way for the Board to reconsider its view in light of Waremart. At the same time however, we authorized the Region to argue to the Board that it should dismiss the complaint because the continued validity of California's application of the Moscone Act is in question as a result of Waremart.

The Employer operates a large chain of discount variety stores. Three of its facilities, all of which were on property owned or exclusively controlled by the Employer, were at issue in the case. The Union had a primary dispute with one of the Employer's suppliers. On several occasions in early 2004, the Union handed out flyers criticizing the quality of that supplier's products and urging consumers not to buy those products. On each of those occasions, the Employer threatened to have the handbillers arrested and/or summoned the police.

We concluded that a Section 8(a)(1) complaint should issue, absent settlement, alleging that the Employer unlawfully threatened the Union handbillers with arrest at each of the three stores where handbilling occurred. Despite its ownership and/or exclusive control of each location and the modest, non-public nature of the premises, the Employer could not lawfully exclude the handbillers because, under extant law, the Board looks to the California courts' application of the Moscone Act to determine Union access rights in California. The Board has viewed the Moscone Act as privileging all peaceful labor conduct on private exterior premises.

We further concluded, however, that the Region should urge dismissal of the complaint by the Board in light of the D.C. Circuit's decision in Waremart.

We initially concluded that none of the stores was the equivalent of a public forum under Robins v. Pruneyard, 153 Cal.Rptr. 854 (1979), which would, under California property law, have obligated the Employer to allow Union handbillers onto its property. Thus, in contrast to the broad invitation to congregate and array of amenities

available in such a forum, the Employer invited members of the public to its stores for the sole purpose of purchasing discounted merchandise. However, there was an arguable violation under extant Board law based on the rights of access set out in the Moscone Act, as interpreted in Sears Roebuck & Co. v. San Diego District Council of Carpenters, 158 Cal.Rptr. 370 (1979), cert. denied 447 U.S. 935 (1980). In Waremart, 337 NLRB 289 (2001), the Board applied the Moscone Act, which privileges all peaceful labor conduct on private exterior premises, to hold that a stand-alone grocery store had no right under California labor law to exclude union organizers engaged in consumer handbilling from the parking lot and walkways adjacent to its store. The Board specifically rejected employer contentions that the Moscone/Sears limitation on property rights was preempted or invalid on Fourteenth Amendment equal protection and Fifth Amendment taking grounds. Based upon that precedent, we authorized the Region here to issue complaint alleging that the Employer had violated the Act by threatening to eject Union handbillers from each of the stores' exterior premises.

We further concluded, however, that the validity of that theory of violation had been cast in doubt as a result of the D.C. Circuit's recent denial of enforcement in Waremart, 354 F.3d 870 (D.C. Cir. 2004). Initially, the D.C. Circuit certified the issue of the constitutionality of the Moscone Act to the California Supreme Court. When that Court declined the certification, the D.C. Circuit independently construed California law on review and concluded that California could not constitutionally accord labor activity greater latitude for trespass than other expressive activity. Accordingly, because such an interpretation in its view would constitute content-based regulation of speech in violation of the First Amendment, the Waremart court concluded that California could not constitutionally prohibit the employer from excluding union agents from the property; accordingly the court denied enforcement of the Board's finding of a violation. Given the clear federal constitutional policy, the D.C. Circuit concluded that if the meaning of the Moscone Act came before the California Supreme Court again, that court either would declare the statute unconstitutional or would construe it differently so as to avoid unconstitutionality.

In light of the D.C. Circuit's decision in Waremart, we authorized complaint but directed the Region to argue for Board dismissal of the complaint in this case. Since state law is determinative of employer property interests, it would not be appropriate to find a violation based on denial of access where the history of the litigation and the decision in Waremart indicates that state law regarding the property owner's right of exclusion is unclear. In the absence of a clear, content-neutral state policy limiting the rights of private property owners to exclude handbillers, the Board should not find such conduct violative of the Act.

EMPLOYER ASSISTANCE
UNLAWFUL RECOGNITION BASED ON A PRIVATE ELECTION WHERE VOTES CAST FOR UNION WERE LESS THAN MAJORITY OF EMPLOYEES IN BARGAINING UNIT

A series of cases involved whether the Employer unlawfully recognized the Union, and the Union unlawfully accepted recognition, based on a private election where the Union obtained a majority of votes cast, but the votes in favor of the union did not amount to a majority of employees in the bargaining unit. We decided that the grant and acceptance of recognition in this circumstance was unlawful.

The parties resolved a series of labor disputes throughout the Employer's system of facilities by entering into a comprehensive settlement agreement that included, among other things, an agreement setting forth procedures for the Union to prove its majority support at an Employer facility. The agreement regulates the parties' conduct during Union organizing campaigns at Employer facilities. In part, it establishes a secret-ballot election process for determining if the Union has obtained majority status at a particular facility. The agreement requires that the Employer recognize the Union if "a majority of employees casting valid ballots vote to be represented" by the Union.

The Union invoked the agreement and held a private election during an organizing campaign at one of the Employer's facilities. Out of 242 eligible voters, 182 votes were cast. There were 93 votes for the Union, 85 against the Union, and 4 non-determinative challenged ballots. The election officer certified the results. No objections were filed to the election. Based on the certification, the Employer recognized the Union.

We concluded that although the Union obtained a majority of votes cast in the private election, the Employer could not lawfully recognize the Union, nor could the Union accept that recognition, because the votes cast for the Union did not amount to a majority of the bargaining unit.

An exclusive bargaining relationship between an employer and a union can be established either through the Board's election and certification procedures under Section 9(a) of the Act, or through voluntary recognition based on a showing of majority support. While the Board has long promoted voluntary recognition and bargaining (see, e.g., San Clemente Publishing Corp., 167 NLRB 6, 8 (1967), enfd. 408 F.2d 367, 368 (9th Cir. 1969)), it has similarly recognized that Board-conducted elections -- under laboratory conditions and under the supervision of a Board agent -- provide the most reliable basis for determining whether employees desire representation by a particular union. Dana Corp., 341 NLRB No. 150, slip op. at 1 (2004)(citing Linden Lumber v. NLRB, 419 U.S. 301 (1974)). See also NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969).

Because voluntary recognition provides no guarantee of laboratory conditions or impartiality, the Board and the courts have long held employers and unions to a strict showing of actual majority support when recognition is granted privately, rather than based on a Board-conducted election. Thus, voluntary recognition of a minority union is simply not allowed under the Act, despite a good-faith belief or seemingly reliable

assertion of a union's majority status. See Int'l Ladies Garment Workers Union (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731, 738-39 (1961); Intalco Aluminum Corp., 169 NLRB 1034, 1034 (1968), enfd. in rel. part 417 F.2d 36 (9th Cir. 1969) (reliance on state agency certification); Sprain Brook Manor, 219 NLRB 809, 809-811 (1975), enfd. 532 F.2d 877 (2d Cir. 1976) (reliance on arbitrator's decision); Autodie Int'l, Inc., 321 NLRB 688, 691 (1996)(reliance on informal private election).

Here, it is undisputed that the Union's recognition was based on private election results that do not establish majority support in the unit; the Union received only 93 votes in a 242-employee unit. We acknowledge that the private election may have followed Board election procedures, including the Board's "political majority rule" (requiring a majority of ballots cast). However, this Board rule is premised on elements that were lacking here, such as statutory safeguards, laboratory conditions, and Board-agent supervision. The "political majority rule" of statutory elections has not been extended to informal, private representation elections. Autodie Int'l, Inc., 321 NLRB at 691; Komatz Construction, Inc. v. NLRB, 458 F.2d 317, 322-23 (8th Cir. 1972). Simply put, it was not a Board-supervised election conducted under Section 9 and cannot be treated as such.

UNLAWFUL PRE-RECOGNITIONAL BARGAINING OVER MANDATORY TERMS AND CONDITIONS OF EMPLOYMENT

Another case raised the issue whether an after-acquired facilities clause contained in the parties' master contract privileged the Employer to bargain with the Union over terms and conditions of employment covering a newly acquired facility before the Union had demonstrated majority employee support at that facility. We concluded that, without regard to the master contract's after-acquired facilities clause, the Employer violated Section 8(a)(2) and the Union violated Section 8(b)(1)(A) by engaging in unlawful pre-recognitional bargaining over mandatory terms and conditions of employment, under the principles set forth in Majestic Weaving Co., 147 NLRB 859 (1964), enf. denied on other grounds 355 F.2d 854 (2d Cir. 1966).

The parties had been signatory to a master contract that, among other things, included an after-acquired facilities clause. Under that provision, the parties agreed that "newly established or acquired operations shall be covered by this Agreement at such time as a majority of employees in a bargaining unit comparable to the classifications set forth herein designate, as evidenced through a card check, the Union as their bargaining representative."

The Employer subsequently won a contract to start work at a new location. Prior to commencing operations, the Employer held three mandatory unpaid employee meetings with Union officials. A Union representative told employees that the Union had already negotiated wage rates and paid holidays, and he indicated that free health

benefits that he stated were "in the bag." The Union representative further stated that the parties were "still negotiating" over other topics, such as vacation and sick leave. The Union subsequently solicited authorization cards from employees who attended the meetings. The Employer began normal operations approximately three weeks later. Soon afterward, the parties entered into a supplemental agreement concerning economic terms applicable to employees at the new facility. Both the Employer and the Union contend that pursuant to the master contract's after-acquired facilities clause, the Employer lawfully recognized the Union only after it had obtained a card majority from the workforce at the new facility.

We decided to issue a Section 8(a)(2) and 8(b)(1)(A) complaint because the parties had engaged in bargaining and had agreed on specific terms and conditions of employment covering the Employer's new workforce before the Union had ever obtained majority status in the new unit.

Section 9(a) guarantees employees freedom of choice in selecting a bargaining representative. See, e.g., International Ladies' Garment Workers' Union (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731, 737 (1961). At the same time, Section 7 assures employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity. Ibid. Thus, an employer that recognizes and negotiates a collective-bargaining agreement with a union that has yet to achieve majority status among its employees unlawfully supports that union in violation of Section 8(a)(2), and the union violates Section 8(b)(1)(A) by accepting that recognition. See Bernhard-Altmann, 366 U.S. at 737-738; The Crossett Co., 140 NLRB 667, 669 (1963).

In Majestic Weaving, the Board held that the employer violated the Act by negotiating an agreement with a union before the union had become the majority representative, even though the employer had conditioned executing the contract upon the union's subsequent demonstration of majority support. The Board found it immaterial that the union had obtained majority support, since the conditional grant of recognition took place before that support had been proven. 147 NLRB at 860.

In the present case, the evidence established that the parties negotiated and even announced to employees the terms and conditions of employment that would cover the new facility, prior to the Union's having shown that it enjoyed majority employee support. Since the Union did not demonstrably represent a majority of unit employees when the parties bargained for and agreed to substantive terms and conditions of employment, their conduct violated Sections 8(a)(2) and 8(b)(1)(A) of the Act. The Board's rationale in Houston Div. of the Kroger Co., 219 NLRB 388 (1975) is inapplicable here, `because the parties prematurely negotiated over terms and conditions of employment at the new facility, and did not simply apply their multi-store existing single unit contract (as in Kroger) to those employees after the Union attained valid majority status there. As a secondary argument, we further concluded that the

Employer prematurely recognized the Union at a time when it was not yet engaged in normal business operations. See Grocery Haulers, Inc., 315 NLRB 1312 (1995).

EMPLOYER REFUSAL TO BARGAIN IN GOOD FAITH
EMPLOYER REQUIREMENT THAT EMPLOYEES SIGN INDIVIDUAL ARBITRATION AGREEMENTS

Two Section 8(a)(5) cases raised the issue of whether an employer could unilaterally require employees to sign individual arbitration agreements that waive their right to bring employment-related discrimination and other claims in a judicial forum. We concluded in one case that, while the waiver of an employee's right to bring statutory claims to a judicial forum is not itself a mandatory subject of bargaining, on the facts presented, that non-mandatory subject became so intertwined with mandatory subjects—namely, dispute resolution, discrimination, and other conditions of employment--that it became a mandatory subject of bargaining. In the other case, we concluded that a more narrowly-drawn arbitration agreement was not a mandatory subject of bargaining.

While the Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974), held that a collective bargaining representative could not waive an employee's right of access to court, it subsequently held that the statutory right to resolve disputes in a judicial forum could be waived by the individual. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). The Court also held that an employer could include a mandatory arbitration provision as part of an employment contract, thus conditioning employment on the employee's acceptance of the arbitration agreement. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001). Although the Court left unresolved the issue of whether an employer must bargain with a union if the agreement is required of employees represented by the union, the D.C. Circuit addressed the issue in Airline Pilots Ass'n Int'l [ALPA] v. Northwest Airlines, Inc., 199 F.3d 477 (1999), judgment vacated and reinstated en banc, 211 F.3d 1312 (D.C. Cir. 2000)(per curiam), cert. denied, 531 U.S. 1011 (2000). Under the Railway Labor Act, the D.C. Circuit held that parties should be obligated to bargain only over proposals on which both sides have authority to offer and concede. Since a union has no authority to offer or concede an individual's statutory right of access to the courts, the court concluded the right of an employee to bring a statutory lawsuit cannot be a mandatory subject of bargaining.

The Board has considered whether individual contracts, in the form of releases used to waive employees' rights to sue, are mandatory subjects of bargaining. In Borden, Inc., 279 NLRB 396 (1986), the Board held that whether such a release was a mandatory subject of bargaining depended on whether the release, a permissive subject of bargaining in isolation, exhibited interdependence with mandatory subjects of bargaining. In that case, while bargaining over severance pay during shut down negotiations, the employer insisted on a general release of all future claims by

employees. The Board concluded that the employer's demand for a general release was not a mandatory subject because it was not sufficiently interdependent with the subject of severance pay, given that the release was not part of the employer's initial severance pay proposal and that it was not added as a quid pro quo for any union concession. In a more recent case, Regal Cinemas, Inc., 334 NLRB 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003), the Board found that a release linked to claims arising out of permanent layoffs was proposed as a quid pro quo for severance pay, and was therefore so intertwined with the mandatory subject of severance pay that the release became a mandatory subject.

While we agreed that the fundamental holding in ALPA is correct, i.e., that the waiver of an individual's right to sue on statutory claims of discrimination is not in and of itself a mandatory subject of bargaining, we concluded that the union in ALPA should have had a role in what constituted the structure and framework of the arbitration agreement because it was part of or could have affected mandatory subjects of bargaining. Applying that view, we noted that in the first case here, the Employer implemented a "narrow" grievance-arbitration clause and a "broad" individual arbitration agreement, which would arguably address non-statutory employee claims over non-contractual terms and conditions of employment (including wrongful termination, failure under federal or state law to provide wages or benefits, and breach of promise). Thus, we concluded that the Union should have an opportunity to bargain with the employer over the scope of the individual arbitration agreements since they served as a means of resolving employee disputes over mandatory subjects of terms and conditions of employment, albeit terms left unaddressed by the contract. In addition, as in ALPA, the individual arbitration agreements would also affect the Section 7 rights of the employees to concertedly utilize that arbitration procedure and have their common claims before a single arbitrator rather than separate arbitration for each claim. Finally, the Union would have an interest regarding such "procedural" issues as the filing requirements for a grievance under the arbitration procedure, the timing for giving notice, and the amount of fees required by the employees, since they would affect the unit.

In contrast, in the second case, we concluded that the possibility of the arbitration agreement intertwining with the mandatory subjects of dispute resolution or elimination of discrimination was eliminated or minimal. This is because the scope of the individual arbitration agreement was sufficiently narrow, and the scope of the grievance/arbitration provision in the collective bargaining agreement sufficiently broad. Thus, the contractual grievance provision not only covered all the terms of the collective-bargaining agreement, but specifically stated that the provision also covered any other employment matter claimed by an employee or the union, therefore covering all issues of discrimination and other matters involving employees' terms and conditions of employment. Furthermore, the arbitration agreement addressed only statutory discrimination claims that were not pursued exclusively through the contractual grievance arbitration procedure, and claims for personal injury or property damage. The arbitration agreement specifically stated that it was not intended to interfere with or alter

any relationship between the employee and the union. Therefore, there was not a sufficient nexus or interdependence between the non-mandatory waiving of the employees' ability to sue when using the arbitration agreement and mandatory subjects of bargaining.

EMPLOYER REFUSAL TO PROVIDE UNION WITH INFORMATION REGARDING STRIKE REPLACEMENTS BECAUSE OF STRIKERS' PICKET LINE MISCONDUCT EXAMINED UNDER "TOTALITY OF THE CIRCUMSTANCES" TEST

In another case, the Employer refused to provide the Union with information regarding strike replacements, because of the strikers' picket line misconduct. We decided to issue complaint and argue that the Employer violated the Act under both current Board law, as well as under the law applied by some circuit courts taking into account the "totality of the circumstances" in the case. We also decided to argue that the Board should adopt the courts' "totality of the circumstances" test.

In 2003, the parties began negotiations for a collective-bargaining agreement. On October 2, the Union began an economic strike. Shortly thereafter, the Employer started hiring strike replacements.

Tempers flared at the picket lines with the arrival of the replacements. Strikers and replacement workers frequently hurled insults and obscenities at each other. Most of the insults were variations of the "scab"-calling common during strikes. There also were vulgar references to sex acts and some racial and ethnic slurs and a handful of threatening comments were also made. However, during the three month strike, there were many days when the above conduct did not occur. There also were no incidents of violence, such as fights or assaults, property damage, or bodily injury. The Employer did not discipline or discharge any strikers for their picket line behavior. The Employer also did not file Board charges nor contend that Union officials participated in, or condoned, the verbal confrontations.

Shortly after the Employer began using strike replacements, the Union requested a list of the replacement employees and their terms and conditions of employment. The Employer refused to provide the names, contending that the picketers' behavior raised concerns over the harassment of replacements. The Union assured the Employer that it was taking measures to ensure peaceful, lawful conduct.

In mid-December 2003, the Employer informed the Union that the replacement employees, who had originally been hired as temporary replacements, had been converted to permanent replacements. In response, the Union requested information concerning the permanent replacements, such as contact information and any employment documents. The Employer responded that it would need about two weeks to compile this information.

On December 29, the Union ended the strike and made an unconditional offer to return to work on behalf of the strikers. The Employer refused to allow the strikers to return on the grounds that they had been permanently replaced. On January 7, 2004, the Employer declared a lockout of strikers and strike crossovers, but not of permanent replacements.

The Employer never provided the Union with the requested information about the permanent replacements. In late January, 2004, the Union repeated its request stating that it needed the information to fulfill its representational role, including offering assistance to terminated replacements over their terminations. The Union also explained that it needed the information in order to verify the replacements' status as permanent or temporary replacements. The Employer again refused to provide any identifying information, relying on the animosity exhibited to replacements during the strike.

We decided that the Employer unlawfully refused to provide the requested information under current Board law, as well as under the law of some circuit courts involving the "totality of the circumstances." Finally, we decided to argue for the adoption of the "totality of the circumstances" analysis.

Information about bargaining unit employees, including names and addresses, is presumptively relevant to a union's representational duties. The Board has repeatedly found that similar information regarding strike replacements is also presumptively relevant. Thus, under current Board law, information about replacements must be provided unless the employer can establish a "clear and present danger" that the union will misuse the information. An employer can establish that danger by showing that replacements were subject to serious incidents of violence, such as property damage and bodily injury, and the union has been implicated in the misconduct. See, e.g., Brown & Sharpe Mfg. Co., 299 NLRB 586, 590-91 (1990).

Some circuit courts have refused to follow the Board's approach to striker replacement information. See, e.g., Metta Electric, 338 NLRB No. 161, slip op. at 6-7 (2003), enf. granted in part and denied in part, 360 F.3d 904 (8th Cir. 2004); Chicago Tribune Co. v. NLRB (Chicago Tribune II), 79 F.3d 604, 607(7th Cir. 1996). These courts have instead applied a balancing test based on the "totality of the circumstances." Under this balancing approach, the courts consider the union's actual need for the information, the employer's claim of harassment, confidentiality or privacy concerns, the existence of alternative means for the union to achieve its goals, and the employer's offer of alternatives to providing the contested information. The Board's presumption of relevance does not fit within this balancing framework.

In the instant matter, the names, contact information, and employment information of replacements still employed was presumptively relevant under Board law. This information was relevant to the Union's representation of striking employees and

replacements who become part of the unit. It would enable the Union both to judge for itself the permanent and temporary status of each replacement and to engage in informed negotiations over strikers' reinstatement rights and an end to the bargaining dispute. Moreover, the Employer had not established a "clear and present danger" of Union misuse. The Union's strike was, as a whole, relatively peaceful. Although some threatening comments were made, the bulk of the incidents involved no more than the normal picket line name calling and verbal taunting. Over the course of a three-month strike there was no violence. We also noted that the Employer did not discipline or discharge any strikers for picket line misconduct.

We also decided that a violation exists under the "totality of the circumstances" analysis. The Employer's basis for refusing to provide the information was not sufficient to outweigh the Union's demonstrable need. Although there was confrontational behavior on the picket line, the three-month strike was violence-free. Some of the strikers arguably may have engaged in unprotected verbal harassment by racial and ethnic slurs and some obscene sexual comments. However, the vast majority of the verbal confrontations did not rise to this level, and some of this behavior was reciprocal. We further noted that the Employer did not discipline or discharge any of the strikers for their picket-line conduct, nor file any Board charge. There was also no evidence that replacements requested confidential treatment of their contact information. More importantly, there was no evidence that Union officials, who would have received the replacements' information, participated in or condoned the confrontational behavior. In these circumstances, we decided that the privacy interests of the replacements did not outweigh the Union's real need for the information.

We also concluded that the courts' balancing analysis based on the totality of the circumstances is a more appropriate way of evaluating information requests about strike replacements. Even where the strike conduct does not establish a "danger" to replacements, the animosity commonly displayed during labor disputes may raise legitimate concerns about disclosure of replacements' information. Moreover, the union's need for the information may vary depending on various factors, including whether the replacements are permanent or temporary, whether there is a dispute about their status, whether the strike has ended or is ongoing, whether the replacements have become, or are likely to become, part of the bargaining unit. Also, where there is a sufficient basis for the employer's concern of harassment, alternative modes of disclosure may adequately provide enough information for the union to fulfill its representational role.

The Board's current test does not take into consideration these relevant factors. By relying on a presumption of relevance, the Board does not require the union to establish a need for the information. Nor does it take into account concerns over animosity or confrontations that fall short of showing a clear danger of misuse. For these reasons, we decided to argue that the Board should reconsider its position and adopt the courts' "totality of the circumstances" test.

EMPLOYER REFUSAL TO PROVIDE UNION WITH BARGAINING NOTES

One case involved an employer's refusal to provide a union with bargaining notes which the union asserted were relevant to a pending arbitration. We decided that the Employer lawfully refused to provide its bargaining notes because they were of dubious relevance to the Union's pending arbitration, the Union's request for the bargaining notes appeared to be merely a mechanism for unprivileged prearbitral discovery, and its request raised serious questions of confidentiality for parties involved in a collective-bargaining relationship.

The parties had a number of disputes concerning job classifications listed in an appendix to their bargaining agreement, which provided that employees "may be placed on any job in any work group within that classification without regard to seniority." The Employer asserted that by this language, it had an unrestricted right to reassign employees covered by the appendix. The Union asserted that when the parties had agreed to this language, the Employer's negotiator had assured the Union that employees in the appendix would only be moved for reasons of absenteeism, vacations, and seasonal manning changes. The Union filed a grievance alleging that the Employer's reassignment of appendix employees at any time for any reason violated this understanding reached during negotiations for the bargaining agreement. The Union then requested copies of the Employer's bargaining notes pertaining to the bargaining agreement negotiations. The Employer refused to provide any of its bargaining notes. The Employer argued that the notes were not relevant and also were confidential because they contain the Employer's bargaining strategy.

We decided to dismiss the charge because the bargaining notes were of dubious relevance, and the Union's request for them otherwise raised issues of prearbitral discovery and confidentiality. An employer must provide union-requested information that may prove relevant to contract negotiations, contract administration, whether to file a grievance, whether to proceed to arbitration, and what position to take once a grievance has been filed. See Jamaica Hospital, 297 NLRB 1001, 1002 (1990). Once an arbitration has been initiated, however, a party may not use this duty to supply information as a mechanism for unprivileged arbitral discovery. See, e.g., California Nurses Assn., 326 NLRB 1362 (1998). Finally, the Supreme Court has held that a union's interest in relevant information may not predominate when an employer asserts a legitimate and substantial interest in maintaining confidentiality. Detroit Edison v. NLRB, 440 U.S. 301 (1979).

The Union failed to demonstrate that the Employer's bargaining notes met the statutory standard of relevance. When the Union requested this information, it not only had already decided to pursue its grievance to arbitration, it had already decided what position to take, i.e., to rely on the existence of an alleged oral understanding. Since

the notes were of dubious relevance to the Union's grievance, the Union's request for them appeared to be directed at pre-arbitral discovery, and not within the scope of the statutory duty to furnish information.

The Employer reasonably argued that its bargaining notes were confidential because they contained the Employer's bargaining strategy. The interests of collective-bargaining are furthered by the parties' confidence that their good-faith bargaining strategies and subjective reactions to negotiations can be memorialized without fear of exposure. See Berbiglia, Inc., 233 NLRB 1476, 1495 (1977)(Board revoked subpoena seeking union records of membership meetings which contained material regarding pending negotiations). The Union's request for the Employer's bargaining notes therefore raised serious questions of confidentiality that may well interfere with the collective bargaining process.

In sum, where the relevance of the bargaining notes had not been clearly demonstrated, and the Union's request for them appeared instead to be directed at pre-arbitral discovery and also raised serious confidentiality concerns, we decided to dismiss the charge.

UNION REFUSAL TO BARGAIN IN GOOD FAITH

UNION REFUSAL TO SUBMIT DRAFT AGREEMENT FOR RATIFICATION

In a case decided during this report period, we found that the Union violated Section 8(b)(3) of the Act when it refused to submit a draft agreement to its membership for a ratification vote.

The Union represented employees at a chain of grocery stores. The Employer and the Union were unable to agree on a successor contract primarily because of the Employer's refusal to alter its proposal to withdraw from the Union's Health and Welfare Fund and to substitute its own health and pension fund. Even though they opposed the Employer's proposal in this regard, the Union's negotiators agreed to present the Employer's final offer to the Union membership for a ratification vote. Pursuant to the parties' past practice, the Union prepared a final draft agreement incorporating the parties' mutual understanding and submitted it to the Employer for review. The Union acknowledged that if there was ratification, it would execute a memorandum of understanding incorporating the draft agreement.

Hours before the scheduled vote, the Employer's attorney telephoned the Union's chief negotiator to discuss several modifications to the draft agreement. There was a credibility conflict between the parties as to the scope of the modifications and what, if any, impact they had on the substance of the draft agreement. The Employer claimed that they were refinements or clarifications of prior understandings and were related to non-substantive matters. The Union, however, claimed that the modifications

were substantive and related to topics that were never discussed by the parties. The Union took the position at this point that it needed further time to consider the changes and to confer with legal counsel. No further discussions were held and the Union cancelled the ratification vote.

After the vote was cancelled, the parties were unable to reach agreement on a new contract. The Union began picketing the Employer's stores and on the same day a decertification petition was filed. The Employer subsequently withdrew recognition from the Union and also made unilateral changes in health benefits and other terms of employment. This conduct became the subject of a related Section 8(a)(5) and (1) complaint.

Based on the above, we found that the weight of the evidence supported the Employer's position that the telephonic discussion between the Employer's attorney and the Union's negotiator on the day of the scheduled ratification vote did not alter the mutual understanding reached between the parties. The testimony of these individuals indicated that a "meeting of the minds" existed concerning the terms of a successor agreement that the Union would execute upon expected ratification by its membership. The Union's abrupt cancellation of the ratification votes was found to be a tactic calculated to avoid its obligation to execute a successor agreement that it opposed. The Employer's desire to correct certain drafting errors and to clarify terms of the agreed upon draft did not relieve the Union of its obligation to submit the draft agreement to its membership for ratification, and upon ratification, to execute the agreement.

UNION'S LAWFUL REFUSAL OF EMPLOYER'S REQUEST TO FURNISH RESULTS OF EMPLOYEE SURVEY CONCERNING SENTIMENTS ABOUT UPCOMING NEGOTIATIONS

In this case, we decided that the Union acted lawfully when it refused to provide the results of employee surveys to the Employer because the release of the surveys would interfere with the Union's exclusive representation of its employees. Our decision supports the collective bargaining process by protecting a union's right to conduct attitude surveys of those it represents, without fear that the surveyed information would be disclosed to an employer.

During negotiations for a successor agreement, the Union proposed to change seniority from departmental to divisional seniority. The Union asserted that its proposal was supported by union members, as indicated by their responses to a survey administered by the Union. The Union also cited the results of the survey to support its proposals on two other issues. The Employer requested copies of the employee surveys, arguing that the information was relevant because the Union had relied on the surveys in making its bargaining proposals. The Union refused to provide the information.

Since the Union relied on the employee surveys in proposing several bargaining positions, consideration was given to whether the Union was obligated to provide the Employer with those parts of the surveys that were relevant to its bargaining proposals. We determined that the type of information the Union collected in the survey concerned employee sentiment and not objective facts. Thus, we decided that disclosure of the information to the Employer would interfere with the Union's exclusive representation of employees.

Parties to a collective bargaining agreement generally have a statutory obligation to provide, upon request, information that is relevant to contract negotiations or the administration of a collective bargaining agreement. NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36 (1967); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-53 (1956); Howard University, 290 NLRB 1006, 1007 (1988). A party need not rely solely on the other party's assertions as to the reason for its bargaining proposals and the other party is obligated, if asked, to provide information it relies upon in advancing its bargaining proposals. See Circuit-Wise, Inc., 306 NLRB 766 (1992), enfd., 992 F.2d 319 (2nd Cir. 1993). "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims . . . . If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." Truitt Mfg., 351 U.S. at 153.

However, information that pertains to employee sentiment on bargaining issues need not be disclosed because it may undermine a party's bargaining position. See

Obie Pacific, Inc., 196 NLRB 458, 458-459 (1972); Morgan Services, 336 NLRB 290 (2001). In *Obie,* the Board held that an employer violated the Act by polling its employees to determine employee sentiment on the subjects to be discussed in collective bargaining. See *Id.* at 458-459. The purpose of the employer's poll was to obtain employee opinions for later presentation to the union as a basis for obtaining a revision in the parties' contract clause. The Board found that the employer's poll impermissibly infringed on the union's status as the employees' exclusive bargaining representative. Similarly, here, the employee survey results contain employee sentiments that may indicate the Union's bargaining strategy in negotiations, and requiring disclosure of those results to the Employer would infringe upon the Union's status as bargaining representative and ultimately hinder collective bargaining. The interests of collective bargaining are furthered by the parties' confidence that their good-faith bargaining strategies can be formulated without fear of exposure. Therefore, it was concluded the Union had no obligation to furnish the Employer with the results of the employee surveys.

This decision is consistent with the concerns for confidentiality in the bargaining process, discussed previously in this report in connection with the case involving a union's request for an employer's bargaining notes, to help it clarify a contract clause in the parties' agreement and to prepare for the arbitration of pending grievances concerning that clause.

SECONDARY BOYCOTTS
UNLAWFUL SECONDARY PICKETING OF NEUTRAL EMPLOYER

In this case, we concluded that the Union engaged in unlawful secondary picketing when it picketed a neutral employer at various jobsites. Contrary to the Union's contention, the evidence failed to establish a single employer relationship between the primary employer and the picketed employer.

The Employer and Employer A are both in the business of construction material testing and drilling. The Union represents some of the construction employees employed by the Employer. The employees of Employer A are not represented by any labor organization. The two companies have a common vice-president, who owns 2% of the Employer and 49% of Employer A. In addition, Employer A has subcontracted work to the Employer on several occasions, and on these occasions the Employer's employees receive direction and assignment of work from the supervisors of Employer A.

The Union had a dispute with the Employer. In furtherance of this dispute, the Union began picketing Employer A's jobsites with picket signs that stated that the Union was on strike against the Employer and Employer A as a "single enterprise." The Employer had no employees on the jobsite at the time of the picketing.

We concluded that since the evidence did not establish a single employer relationship between the companies, the Union violated Section 8(b)(4)(i)(ii)(B) of the Act when it picketed neutral Employer A. Generally, the Board examines the following four factors in determining whether separate businesses constitute a single employer: (1) common ownership or financial control; (2) common management; (3) functional interrelation of operations; and (4) centralized control of labor relations. Beverly Enterprises, Inc., 341 NLRB No. 38, slip op. at 11 (2004), citing Radio & Television Broadcast Technicians Local 1264 v. Broadcast Services of Mobile, 380 U.S. 255 (1965). The party claiming that two apparently separate entities are a single employer (here, the Union) has the burden to demonstrate the existence of the above factors. Boich Mining Co., 301 NLRB 872, 873 (1991), enf. denied on other grounds, 955 F.2d 431 (6th Cir. 1992); see also Service Employees Local 525 (General Maintenance Co.), 329 NLRB 638, 639 (1999). The factors most critical to single employer analyses are financial and operational control of both companies, Polis Wallcovering, 323 NLRB 873, 880 (1997); and common control of labor relations. Beverly Enterprises, supra, 341 NLRB at slip op. 11, citing Parklane Hosiery Co., 203 NLRB 597 (1973). In analyzing the control of labor relations, the Board looks at the actual control over the day-to-day operations. Id.

In our case, we concluded that there was insufficient evidence to establish that the Employer and Employer A constitute a single employer enterprise because there was a lack of substantial evidence that there is common management, common ownership or financial control, and centralized control over labor *relations* between the two companies. In this regard, although there is a small overlap of ownership by the vice-president of both companies, the evidence indicated that the vice-president did not have any significant operational or financial control of either company. In addition, while Employer A subcontracted for manpower and equipment from the Employer, the evidence indicated that the subcontracting was done on an arm's length basis. Although Employer A's supervisors were able to assign and direct the Employer's employees while they are performing subcontracted work at Employer A's jobsites, there was no evidence of common control over labor relations by either company concerning the authority to hire, fire, or discipline employees. Under these circumstances, the totality of evidence failed to establish a single employer enterprise.

Since the two companies did not constitute a single employer enterprise, there was sufficient evidence to establish that the Union engaged in purely secondary conduct in violation of Sections 8(b)(4)(i)(ii)(B) when it picketed at Employer A's jobsites.

UNION'S ALLEGED AREA STANDARDS PICKETING UNLAWFUL WHERE EMPLOYER'S COMPENSATION LEVELS SATISFIED GENERAL PREVAILING WAGE RATES AND DAVIS-BACON ACT PROVISION

In another case, we concluded that a Union engaged in unlawful conduct when it picketed a landscape Employer's jobsites with area standards picket signs. We found

that the Union's area standards claim was pretextual and that evidence established that the picketing was actually motivated by secondary and recognitional objectives. There was no basis for the Union's assertion that the Employer was not meeting area standards because at the time it initiated picketing, the Union was aware that the Employer's compensation levels were consistent with all but a few landscape employers in the area and that the Employer was in compliance with the provisions of the Davis-Bacon Act.

The Employer was one of 15 landscape construction contractors that were members of an Association. The Association had a current collective bargaining agreement with Union A covering its landscape plantsmen, truck drivers, mechanics and helpers. (The Association had a collective bargaining agreement with a predecessor union representing these employees prior to 2004.) In addition to the 15 members of the Association, numerous other landscape contractors operating within the jurisdiction of the Union have adopted the terms of the agreement with Union A. The Union also represents landscape construction workers and has collective bargaining agreements with landscape contractors.

In 2002, the Union had approached the Association that represented the Employer about representing landscape employees and had indicated a contract wage range. Thereafter, the Union sent a letter to all area contractors bound by Union agreements asserting that the listed members of the Association (including the Employer) did not have contracts with the Union and did not pay "prevailing landscape wages" as certified by the state. The Union identified two companies as having Union contracts and paying prevailing wages. The Union also indicated that it was reserving the right to notify the public that the listed companies were not paying prevailing landscape wages and benefits. The Union also asserted its position that its labor contracts required that landscape work only be performed by the two landscape contractors that had signed agreements with the Union.

Subsequently, the Union lost a Board-conducted election and a different union was certified as the representative of landscape employees employed by Association members. The other union and the Association entered into a collective bargaining agreement, which was also adopted by numerous other area landscape employers. Landscape employees working for Association employers were paid "grandfathered wages" based on an agreement between the predecessor union and the Association.

Several months after the Union lost the election, the Employer began working as a landscape subcontractor on a federally funded project subject to the requirements of the Davis-Bacon Act. The Union investigated the wage rates paid and learned that the employees were paid pursuant to the Association agreement and that the rate met the requirements of Davis-Bacon. These rates, while apparently conforming to Davis-Bacon requirements, nonetheless did not match the Union-Association contractual wage rate. The Union commenced picketing with area standards signs. The

Employer's employees, along with other employees, honored the picket line, which remained up until the Employer was removed from the site.

We decided that the Union's pre-election letters established its secondary object of having all landscape work performed by the two firms having Union contracts. We further decided that the Board representation election that the Union lost established its desire to represent the Employer's employees. Notwithstanding its earlier conduct, the Union asserted that the picketing was solely in support of an area standards objective. However, the evidence indicated that prior to the initiation of picketing the Union was on notice that the Employer was paying wages and benefits consistent with an Association collective bargaining agreement to which most area employers were a party. The Union had also received information that the Employer was in compliance with the requirements of Davis-Bacon. The only Union basis for asserting that the Employer was not paying area standards was that the Employer was paying wages and benefits lower than those provided in the Union's contract with two area employers. In these circumstances, notwithstanding the hiatus between its earlier conduct and the picketing, we concluded that the Union had not abandoned its unlawful objectives and limited itself to lawful area standards picketing. Plumbers Local 290 (Streimer Sheet Metal Works), 323 NLRB 1101, 1113 (1997).

The area standards defense to allegations of unlawful picketing was established in Calumet Contractors Assn., 133 NLRB 512 (1961). The Board provided an expanded explanation of what would constitute legitimate area standards objectives in Local 741, United Association of Journeymen (Keith Riggs Plumbing), 137 NLRB 1125 (1962). There, noting the enactment of the Davis-Bacon Act relating to public contracts, the Board acknowledged that, apart from an interest in organization and recognition, unions have a legitimate interest "that employers meet prevailing pay scales and employee benefits because otherwise employers paying less than prevailing wage scale would ultimately undermine the area standards." Id. at 1126. Thus, the Board would not find a violation of 8(b)(4) where there was no independent evidence to controvert a picketing union's statement that it only wanted the employer to pay union scale and did not want to bargain with the employer or organize its employees.

We did not view these Board decisions as supporting the lawfulness of picketing where, as in our case, the objective was to cause an employer that was already paying prevailing wages to pay higher wages. In reaching this decision, consideration was given to cases indicating that a union may engage in lawful area standards picketing so long as such picketing has an objective of protecting wages and benefits negotiated by the picketing union. E.g., Sales Delivery Drivers, Local 296 (Alpha Beta Acme Markets, Inc.), 205 NLRB 462, 469 (1973); Giant Food Markets, Inc., 241 NLRB 727, 728 (1979), set aside on different issue at 633 F.2d 18 (6th Cir. 1980).

Under the literal language of Sales Delivery and Giant, the Union could argue that it was picketing to protect the contractual benefits it had obtained from erosion by employers that paid lower wages and benefits. However, notwithstanding language

used in the above cases, there appears to be no case in which the Board has held picketing to be lawful in circumstances like those in this case, where the picketing union has contractual rates that are higher than prevailing wage rates in the area. To permit the Union to define area standards benefits as whatever the Union has secured in a contract with any employer would disregard the plain meaning of the term area standards. U.S. Postal Service, 302 NLRB 332, 334-5 (1991); United Food and Commercial Workers (Visiting Nurse Health System), 336 NLRB 421, 425 (2001). The plain meaning of the term "area standards" is illustrated by the frequency with which the Board uses this term interchangeably with the term prevailing wages. See Keith Riggs Plumbing, supra; Local 107, International Hod Carriers (Texarkana Construction Co.), 138 NLRB 102 (1962); Local 701, IBEW, 255 NLRB 1157, 1158 (1981), enfd. 703 F.2d 501 (11th Cir. 1983), cert. denied 464 U.S. 950 (1983); Int'l Union of Operating Engineers (Associated Engineers), 270 NLRB 1172, 1174 fn. 3 (1984).

REMEDIES
GENERAL COUNSEL SEEKS AWARD OF LITIGATION EXPENSES UNDER THE "BAD FAITH" EXCEPTION TO THE AMERICAN RULE

In this case, we concluded that, because the Respondent fraudulently fabricated its entire affirmative defense at the hearing, the Region should seek an award of the General Counsel's litigation expenses under the "bad faith" exception to the American Rule requiring litigants to bear their own litigation expenses.

An Administrative Law Judge issued a decision in this case dismissing the allegation that Respondent unlawfully discharged its employee. The ALJ held that the General Counsel had established a prima facie case that Respondent had unlawfully discharged the discriminatee. However, the ALJ concluded that the Respondent had presented a sufficient defense under Wright-Line, 252 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), by establishing that it would have terminated him for violating its attendance policy even in the absence of any protected activity.

At the initial hearing in this case, Respondent had introduced a large number of attendance records to establish that it had treated the employee the same as any other individual who had been absent from work without prior approval or proper documentation. The ALJ credited the testimony of the Respondent's owner and timekeeper that these records were maintained in the proper course of Respondent's business operations and accurately reflected its absentee policy. However, after the hearing closed, the Region learned from the timekeeper that Respondent had used entirely falsified attendance records as evidence at the hearing. The timekeeper stated that she and the owner had altered Respondent's attendance records to make it appear

that other employees had received discipline consistent with that given to the discriminatee. We moved to reopen the hearing.

At the reopened hearing, Respondent contended that it reviewed its attendance records from time to time to ensure that its attendance policy was consistently applied, and that the timekeeper's participation in changing attendance documents prior to the initial hearing was merely a part of Respondent's normal review process. The Region argued that the Respondent fraudulently fabricated the attendance documents and that the ALJ should find the alleged violations.

We concluded that the Region should seek an award of the General Counsel's litigation expenses because of Respondent's bad faith conduct in fraudulently fabricating its entire defense in this case.

The Board has long held that it has the authority to award litigations expenses where a respondent engages in "frivolous litigation" before the Board. Tiidee Products, Inc., 194 NLRB 1234 (1972) enf. as modified 502 F.2d 349 (D.C. Cir. 1974), cert. den. 417 U.S. 921 (1974), 421 U.S. 991 (1975). The Board recently held that it may award litigation expenses, under Section 10(c) of the Act, where a respondent offers a frivolous defense, or otherwise exhibits "bad faith" in the unfair labor practice litigation. Frontier Hotel & Casino, 318 NLRB 857 (1995), enf. den. in pertinent part sub nom. Unbelievable, Inc. v. NLRB, 118 F.3d 795 (D.C. Cir 1997). The D.C. Circuit Court of Appeals denied enforcement, holding that under then-recent Supreme Court decisions the Board lacks the requisite statutory authority under Section 10(c) to award litigation expenses. However, the D.C. Circuit left open the question of whether the Board may award litigation expenses pursuant to the Board's "inherent authority" to control its own proceedings under the "bad faith" exception to the American Rule. Unbelievable, Inc., supra, 118 F.3d at 800-806.

In Lake Holiday Manor, 325 NLRB 469 (1998), the Board ordered reimbursement of the General Counsel's litigation costs and attorney fees citing the Board's "inherent authority" to protect its own proceedings. The Board noted that respondent had rejected a second settlement agreement for a "capricious" reason "primarily directed simply at delay of the litigation," and had later moved for a postponement of a rescheduled hearing due to substitution of new counsel, even though the ALJ had specifically approved prior counsel's withdrawal on the condition that it not impact the rescheduled hearing date. Id. at 470.

Federal courts have also awarded litigation expenses under their "inherent authority" in circumstances similar to those in the instant case. In Chambers v. NASCO, 501 U.S. 32 (1991), the district court ordered defendant Chambers to pay plaintiff's attorney fees because of Chambers' bad faith in initially attempting to deprive the court of jurisdiction by means of a fraudulent trust and deed conveyance, and in later filing false and frivolous pleadings. The Supreme Court upheld the award because

defendant's "entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court . . ." Id. at 51.

The "bad faith" exception has also been applied to a meritless defense based upon a fabricated document. In Ostanto v. Telewide, 880 F.2d 642 (2d Cir. 1989), plaintiff sued for fraud and breach of contract over its licensing of movie films from defendant. The district court awarded the plaintiff full attorney fees because it "found an exhibit to be fraudulent and a defense to be unfounded." Id. at 651. The Second Circuit Court of Appeals noted that not all of plaintiffs' attorney fees "resulted from the meritless defense and fabricated document" and that "[o]nly those fees attributable to the offensive conduct can be awarded." Ibid. The Circuit Court thus remanded the case for the district court to decide what portion of the plaintiff's attorney fees resulted from the bad faith conduct.

The Respondent here used a panoply of fraudulently altered documents to assert a meritless defense. Respondent's conduct was comparable to the fraudulent documents and false, frivolous pleadings in Chambers v. NASCO, and constituted a similar attempt to "perpetrate a fraud" upon the Board. Respondent's conduct was even more egregious than the defendant's conduct in Ostanto v. Telewide because Respondent here fraudulently fabricated its entire defense. Thus, under these circumstances, we concluded that the Region should seek an award of the General Counsel's litigation expenses.

SUMMARY EXCERPTS OF ETHICS ISSUES

New York's Version of Rule 4.2

Issue:

The Region was investigating charges alleging that the Employer violated the Act by "spot checking" emergency medical technicians in the field, eliminating clock-in pay, changing disciplinary procedures, and eliminating Christmas bonuses, all in retaliation for union activity. The Region wanted to interview two emergency medical technicians ex parte, and inquired about the effects of a pending R-case proceeding.

The Union had filed a petition to represent a unit of the Employer's emergency medical technicians. At the R-Case hearing the Employer contended that five of the approximately 29 employees in the petitioned-for unit are Sec. 2(11) supervisors. The RD found to the contrary, and the Employer filed a Request for Review that was pending when the Region wanted to conduct the investigatory interviews.

The two emergency medical technicians the Region wanted to interview ex parte were among the five found not to be statutory supervisors. The Region believed that neither of them were actors in the alleged unlawful conduct.

Determination:

The Region was instructed to interview the emergency medical technicians ex parte, but not to elicit or obtain information that might be protected by the Employer's attorney-client privilege. Two considerations entered into our determination.

First, the Region's position was that the emergency medical technicians were not supervisors and were not actors in the alleged unlawful conduct. Although the Employer continued to urge its contrary position by filing a Request for Review, the Board had not yet acted on that Request at the time the Region wanted to interview the witnesses ex parte. The RD's decision is the authoritative determination regarding the witness's status until there is a decision to the contrary.

Second, even if the emergency medical technicians are supervisors, they do not fall within New York's version of Rule 4.2, which provides that "[d]uring the course of the representation of a client a lawyer shall not (1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so." N.Y. Code of Professional Responsibility Rule 7-104.

In Niesig v. Team 1, 76 N.Y. 2d 363 (1990), the court adopted the following standard to determine whether an individual is a "party" within the meaning of this rule:

> The test that best balances the competing interests, and incorporates the most desirable elements of the other approaches, is one that defines "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter egos') or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally. Id. at 374.

The Court made clear that witnesses will be deemed parties when they have "speaking authority" for the organization, and thus "have the legal power to bind the [organization] in the matter" at issue. Id. On the other hand, the test permits direct access to employees who were merely witnesses to an event for which the corporate employer is being sued. Id. at 375. See Gilbert v. State of New York, 662 N.Y.S.2d 989, 992-993 (1997) (in motorist's action against state for injuries allegedly caused by icy road, department of transportation employee who had no responsibility regarding maintenance of the portion of road where accident occurred was fact witness as to road conditions and was not a "party" under Niesig).

The Region did not believe that the witnesses were actors in any of the alleged unlawful conduct. In addition, there is no indication that they could speak for and bind the Company in this case or implement the advice of counsel.

Accordingly, even if they are statutory supervisors, they would not fall within New York's version of Rule 4.2.

Washington's Version of Rule 4.2

Issue**:**

The Region was investigating a charge alleging that the Company unlawfully discharged an employee in retaliation for her union organizing activities. A Company supervisor came forward voluntarily, and offered to give the Region relevant information about the Company's union animus. This individual is one of five "supervisors" who report to the department head who in turn reports to the head of the facility where the Company provides contract guard service. He works in a different department than the charging party, and was not alleged to have committed any unfair labor practices.

Determination**:**

The Region was instructed that it could interview the witness ex parte, but should not solicit or obtain attorney-client privileged information.

In Wright v. Group Health Hospital, 103 Wash.2d 192, (1984), the court held that current employees are considered "parties" for purposes of Washington's "skip counsel" rule only if they have "managing authority sufficient to give them the right to speak for, and bind, the corporation." The court further explained that those with managing/speaking authority "are ultimately responsible for managing the entity's operations," and that they are "the multi-person entity's alter ego - they can speak and act for the entity and can settle controversies on its behalf." Id. at 201-202 (quotation omitted). Those in this category are at a fairly high managerial level. See Young v. Group Health Coop., 85 Wash.2d 332, 338 (1975) (doctor had "speaking authority" for hospital); Griffiths v. Big Bear Stores, Inc., 55 Wash.2d 243, 247 (1959) (supermarket manager had "speaking authority"); Kadiak Fisheries Co. v. Murphy Diesel Co., 70 Wash.2d 153, 162-163 (1967) (maintenance manager for commercial fishing company did not have "speaking authority"). As to current employees not in this category, the court held that they could be interviewed if they witnessed the events, or even if their acts or omissions caused the events in dispute. Id. at 200.

Although Wright was decided under the predecessor to Washington's present Rule 4.2, that case was cited and discussed in an article by the state's Chief Disciplinary Counsel, entitled Ethics and the Law: Communicating with Represented Persons (February 2000). That article, which is available on the State Bar's Web Cite (www.wsba.org/barnews/), describes Wright as "Washington's leading no-contact case."

The witness in this case was not a managing/speaking agent within the skip counsel rule's protection. Even though the witness was a supervisor, he is not a high-level manager; there are two levels of management above him. In addition, the witness did not have supervisory responsibilities respecting the Charging Party, and did not

even work in the Charging Party's former department. For all these reasons, the Region could contact him ex parte under Washington's ethics rules.

SECTION 10(j) AUTHORIZATIONS

During the three month period from November 1, 2004 through January 31, 2005, the Board authorized a total of five (5) Section 10(j) proceedings. Most of the cases fell within factual patterns set forth in General Counsel Memoranda 01-03, 98-10, 89-4, 84-7, and 79-77. See also NLRB Section 10(j) Manual (September 2002), Section 2.1, "Categories of Section 10(j) Cases."

One case involving an Employer's refusal to deal with an incumbent Union was somewhat unusual and therefore warrants special discussion.

The employees in a large, multi-location bargaining unit overwhelmingly reaffirmed their support of the long-term incumbent Union in a Board-conducted election. Thereafter, both before and after a successful union affiliation vote to merge with a larger union, the Employer repeatedly tried to undermine the Union. First, the Employer unilaterally imposed new restrictions on the Union's previously unrestricted right of access to the Employer's facilities. Historically, the Union's primary method of communication with unit employees was through store visitations. Next, the Employer refused to recognize and deal with the Union after the affiliation with the larger union. As part of that refusal, the Employer failed to provide the Union with basic information necessary for collective bargaining and communication with the unit, specifically the names, home addresses and telephone numbers of the unit employees. There was evidence that, as a result of the Employer's violations, fewer grievances had been filed by employees and the Union. Before the Board authorized Section 10(j) relief, the Administrative Law Judge issued a favorable decision sustaining the complaint allegations. Specifically, the ALJ found that the union affiliation vote was proper under NLRA standards and that the affiliated Union remained the Section 9(a) representative of the unit employees.

The Board concluded that Section 10(j) relief was necessary in this case to preserve and protect the affiliated Union's status as the incumbent Section 9(a) bargaining representative in this unit. The Employer's denial of Union access to unit employees at the Employer's facilities and refusal to provide presumptively relevant information were preventing the Union from communicating with the employees it represents. Given the historically large turnover among unit employees, the Employer's unfair labor practices predictably would cause irreparable erosion of employee support for the affiliated Union. Absent injunctive relief, the incumbent union would be unable to properly commence new collective-bargaining negotiations after the Board order issues in due course. The Board directed the Region to seek, inter alia, an injunction that granted the Union an affirmative bargaining order, its historical unrestricted right of access to the Employer's facilities, and the requested necessary and relevant

information concerning the unit employees. This case is currently pending in the district court.

The five cases authorized by the Board fell within the following categories as described in General Counsel Memoranda 01-03, 98-10, 89-4, 84-7 and 79-77:

Category	Number of Cases In Category	Results
1. Interference with organizational campaign (no majority)	1	Case is pending.
2. Interference with organizational campaign (majority)	2[1]	Won one case; one case settled before petition.
3. Subcontracting or other change to avoid bargaining obligation	0	- - -
4. Withdrawal of recognition from incumbent	1	Case is pending.
5. Undermining of bargaining representative	0	- - -
6. Minority union recognition	0	- - -
7. Successor refusal to recognize and bargain	0	- - -
8. Conduct during bargaining negotiations	1	Case is pending.

Category	Number of Cases	Results

[1] A majority of the Board in one of the cases did not authorize seeking an interim bargaining order consistent with NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

	In Category	
9. Mass picketing and violence	0	- - -
10. Notice requirements for strikes and picketing (8(d) and 8(g))	0	- - -
11. Refusal to permit protected activity on property	0	- - -
12. Union coercion to achieve unlawful object	0	- - -
13. Interference with access to Board processes	0	- - -
14. Segregating assets	0	- - -
15. Miscellaneous	0	- - -